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WASHINGTON, D.C. 20301-1600

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MEMORANDUM FOR GENERAL COUNSELS OF THE MILITARY DEPARTMENTS
GENERAL COUNSELS OF THE DEFENSE AGENCIES

SUBJECT: Guidance on Lobbying and Public Relations Activities

Attached are two versions of a memorandum -- one annotated with citation to authority -- providing general guidance on how to comply with the provisions of federal law that limit certain forms of communication by federal officials with members of Congress and the public. I have also attached a memorandum I sent to OSD Staff Principals on this subject. You may want to consider sending a similar memorandum to your principals.

If you have any questions about this guidance, please call David W. Ogden, Deputy General Counsel (Legal Counsel), at x72714.


Judith A. Miller

GUIDELINES
ON LOBBYING AND PUBLIC RELATIONS ACTIVITIES

Provisions of federal law limit certain forms of communication by federal officials with members of Congress and the public.¹ These guidelines summarize administrative

¹ See 18 U.S.C. §1913, which provides

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

A separate provision found among the miscellaneous provisions of each year's Defense Appropriations Act (section 8014 in the 1995 Act, Public Law 103-335) prohibits the use of appropriated funds "directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress." Although the rider in the Defense appropriations acts has not been the subject of analysis, very similar riders have been interpreted to prohibit the same activities as the criminal provision in 18 U.S.C. §1913.

Another recurring section in Defense appropriations acts (section 8001 in the 1995 Act, Public Law 103-335) prohibits the

interpretations of these complex laws. In certain cases, however, because the principles are not clearly defined, actions that would appear to be improper under these guidelines are permissible. You should contact your designated ethics official for further assistance when applying these guidelines to contemplated activities.

Lobbying

Communication with Congress

- Department Officials may communicate directly with a member of Congress for the purpose of providing information or soliciting that member's support for the Administration's position on any legislative matter, including legislation or appropriations, pending or not, whether or not such contact is invited.²

use of appropriated funds for "publicity or propaganda purposes not authorized by Congress." This provision is directed at public relations activities generally, not only those activities that are related to congressional action.

Finally, 39 U.S.C. §3204(a) restricts use of penalty mail to send "any article or document unless - (1) a request therefor has been previously received by the department or establishment; or (2) its mailing is required by law.

Although the broad wording of 18 U.S.C. §1913 and section 8014 of the Defense Appropriations Act would seem to prohibit virtually any effort by the executive branch to influence congressional action, The Department of Justice and the Comptroller General have consistently read the provisions quite narrowly. See Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel to Richard Thornburgh, Attorney General, September 28, 1989; Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel to Arthur B. Culvahouse, Jr., Counsel to the President, February 1, 1988; To The Honorable Jack Brooks, B-229069, 66 Comp. Gen. 707, September 30, 1987; To The Honorable Lowell Weicker, Jr., B-223098, B-223098.2, October 10, 1986; To The Honorable Edward P. Boland, B-196559, 59 Comp. Gen. 115, December 3, 1979.

Communication with the Public About Legislative Matters

- Department officials should not engage in large-scale "grass-roots" lobbying activities with respect to legislation or appropriations. That is, they should not engage in a significant effort to encourage members of the general public to contact or communicate with Congress on legislation or appropriations.³ They may, however, conduct grass-roots lobbying activities with respect to treaties, nominations, or other matters before Congress that are not legislation or appropriations.⁴
- It is considered grass-roots lobbying – and therefore is

These provisions have not been read to bar contacts between Administration officials and Congress that are initiated by Members of Congress or that relate to requests for legislation or appropriations that the Executive Branch employee in the fulfillment of his official duties deems necessary to conduct the public business. See, e.g., Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel to Richard Thornburgh, Attorney General, September 28, 1989. Unsolicited communications with members of Congress, however, must be through official Department channels, that is, through those officials authorized to speak to Congress on behalf of the Department. Id.

³ See Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel to Richard Thornburgh, Attorney General, September 28, 1989; Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel to Arthur B. Culvahouse, Jr., Counsel to the President, February 1, 1988; To The Honorable Jack Brooks, B-229069, 66 Comp. Gen. 707, September 30, 1987; To The Honorable Lowell Weicker, Jr., B-223098, B-223098.2, October 10, 1986; To The Honorable Edward P. Boland, B-196559, 59 Comp. Gen. 115, December 3, 1979.

⁴ 18 U.S.C. §1913 applies only to activities "intended or designed to influence . . . legislation or appropriation[s]."

proscribed - to distribute written materials to the public on a large scale that encourage members of the public to contact or communicate with Congress about legislation or appropriations. Therefore,

- Department officials may distribute written materials to the public, even on a large scale, that advocate the Administration's position on legislative matters, including legislation or appropriations, but do not encourage members of the public to contact or communicate with Congress; and
- Department officials may make a statement in writing, for example in an op-ed piece, that encourages members of the public to contact or communicate with Congress about legislation or appropriations, so long as they do not distribute that statement to the public on a large scale.⁵
- Department officials may also make public speeches that promote the Administration's position on legislative matters, including legislation or appropriations. These speeches may even encourage members of the public to contact or communicate with Congress about legislation or appropriations, so long as the Department does not distribute copies of materials containing that encouragement

⁵ The Department of Justice has consistently interpreted section 1913 to allow public speeches or writings in which executive branch officials urge public support for particular legislation, where such speeches or writings are not part of a large-scale campaign intended to galvanize the public into lobbying activity of its own. See Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel to Richard Thornburgh, Attorney General, September 28, 1989; Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel to Arthur B. Culvahouse, Jr., Counsel to the President, February 1, 1988.

This is subject to the restrictions set forth below on communication with the public generally.

to the public on a large scale.⁶

Relations with Organizations Conducting Lobbying

- Department officials should not use appropriated funds to aid any outside organization in conducting large-scale grass-roots lobbying activities with respect to legislation or appropriations. Therefore, Department officials
 - Should Not create any materials for the organization to distribute in connection with such activities or have any government employee spend time collecting materials that would not otherwise have been collected, and
 - Should Not solicit the organization to conduct large-scale grass-roots lobbying activities, or control the organization in its conduct of such activities. Department officials should not use the outside organization as an arm of the Department to engage in proscribed grass-roots lobbying activities.⁷
- But Departmental officials may provide preexisting materials or information to an outside organization, at the organization's request, for it to reproduce and distribute or use as it sees fit in connection with any grass-roots lobbying activity.⁸

⁶ Id.

⁷ Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel to Richard Thornburgh, Attorney General, September 28, 1989; Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel to Arthur B. Culvahouse, Jr., Counsel to the President, February 1, 1988; Memorandum from Fred R. Fielding, Counsel to the President, for Members of the White House Staff re "Support of Administration Legislative Programs," February 23, 1981.

⁸ Id.

Communication with the Media About Legislative Matters

- Department officials may communicate the Administration's position on legislative matters, including legislation or appropriations, to the media, including by providing members of the media with speeches, articles, or other materials that support the Administration's position. Provision of these materials need not be in response to a specific request, but should be to parties that have expressed or are known to have a general interest.⁹

Public Relations

Communication with the Public Generally

- Department Officials should not engage in "covert" public relations activities, that is, activities that are designed to get information to the public through the media or otherwise and are generated at least in part by the Department, but are made to appear as if they come solely from a source outside the government.¹⁰ Examples of this kind of prohibited activity are
 - Preparing letters to the editor, op-ed pieces, or other publications to be published solely as the opinions of individuals outside of the government.¹¹

⁹ Id. Provision of materials to the media should not be in connection with a large-scale lobbying campaign that has as its purpose influencing members of the public to contact or communicate with members of Congress.

¹⁰ See Public Law 103-335 section 8001; Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel to Arthur B. Culvahouse, Jr., Counsel to the President, February 1, 1988; To The Honorable Jack Brooks, B-229069, 66 Comp. Gen. 707, September 30, 1987; To The Honorable Lowell Weicker, Jr., B-223098, B-223098.2, October 10, 1985.

¹¹ To The Honorable Jack Brooks, B-229069, 66 Comp. Gen. 707, September 30, 1987; To The Honorable Lowell Weicker, Jr., B-

- Collaborating in the preparation of materials that will be published or distributed to the public that purport to be written by and present the opinions exclusively of individuals outside of the government.¹²
- As part of a public relations campaign, arranging for meetings of individuals outside of the government with the media, but making it appear as if the government had no involvement.¹³
- Departmental officials should not engage in public relations activities that have as their sole purpose "self-aggrandizement" or "puffery" about the Department, that is, a public relations campaign that has as its sole purpose emphasizing the importance of the Department or its activities.¹⁴

223098, B-223098.2, October 10, 1985.

¹² To The Honorable Jack Brooks, B-229069, 66 Comp. Gen. 707, September 30, 1987.

¹³ Id.

¹⁴ See Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel to Arthur B. Culvahouse, Jr., Counsel to the President, February 1, 1988; To The Honorable Jack Brooks, B-229069, 66 Comp. Gen. 707, September 30, 1987; To The Honorable Lowell Weicker, Jr., B-223098, B-223098.2, October 10, 1985.

Use of Penalty Mail

- Departmental Officials should not use penalty mail¹⁵ to send public relations or informational materials or documents when they have not been requested.¹⁶ This provision does not restrict unsolicited distribution of any materials by means other than penalty mail, such as telecopier or common carrier.

¹⁵ "Penalty mail" is official mail that is authorized by law to be transmitted in the mail without prepayment of postage.

¹⁶ 39 U.S.C. §3204(a). We have discovered no case or opinion that interprets this section. Because its prohibitions apply to "articles" and "documents" and not to "official correspondence" - a term that is used elsewhere in the section - it can fairly be read to prohibit the mailing of only informational and public relations materials of the type that typically are involved in mass-mailings, not of official correspondence. Government officials may inquire by means other than penalty mail whether proposed recipients are interested in the materials and, if so, solicit a request. Such a request may be by category (i.e., for all materials on a certain subject matter or that the sender believes may be of interest to the recipient) or specific.